



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Emjay Engineering & Construction Co., Inc.

File: B-243060

Date: June 21, 1991

Douglas G. Worrall, Esq., Smith, Somerville & Case, for the protester.
Christopher Kane, Esq. and Stephen M. Seeger, Esq., Lyon and McManus, for TGMI/Contractors, Inc., an interested party.
Amy J. Brown, Esq. and Lane Tucker, Esq., General Services Administration, for the agency.
Jeanne White Isrin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid that did not include executed Certificate of Procurement Integrity was properly rejected as nonresponsive as completion of the certificate imposes substantial legal burdens on a contractor and is properly viewed as a matter of responsiveness, rather than responsibility, and cannot be waived as a minor informality.

DECISION

Emjay Engineering & Construction Co., Inc. protests the rejection of its bid as nonresponsive, and the award of a contract to TGMI Contractors, Inc., under invitation for bids (IFB) No. GS-C3P-90-DXC-0064, issued by the General Services Administration (GSA) for replacement of the air-handling fans and removal of the asbestos insulation at the Social Security Complex in Woodlawn, Maryland.

We dismiss the protest.

The solicitation was issued on October 1, 1990. Notice of the Requirement for a Certificate of Procurement Integrity and a

copy of the certificate, Federal Acquisition Regulation (FAR) § 52.203-8, were included in the IFB, as required under FAR § 3.104-10.1/ The provision included instructions on how and when to execute the certificate, specifically stating that in the case of an IFB where the contract award was expected to exceed \$100,000, the certificate was to be included in the bid submission. Bid opening was held on December 10 with three firms submitting bids. Emjay was the apparent low bidder, but its bid was deemed nonresponsive by the contracting officer, pursuant to Federal Acquisition Regulation (FAR) § 14.404-2(m), for failure to submit an executed Certificate of Procurement Integrity.

Emjay claims that the contracting officer erred in rejecting its bid as nonresponsive. It maintains that the certification requirement has no effect on its willingness to perform the contract in material respects, and therefore involves a matter of responsibility, rather than responsiveness, which can be satisfied any time before award. In the alternative, Emjay argues that the omission of the certificate should be considered a minor informality that can be waived or corrected under FAR § 14.405, as is done with many other certifications that Emjay argues are similar, e.g., the Certificate of Independent Price Determination and the Small Business Concern Representation.

The test for responsiveness is whether the bid as submitted represents an unequivocal offer in all material respects to perform the exact thing called for in the IFB so that, upon acceptance, the firm will be bound to perform in accordance with all of the solicitation's terms and conditions. Intermountain Elec., Inc., B-236953.2, Jan. 31, 1990, 90-1 CPD ¶ 143. To determine whether a requirement is material, and hence a matter of responsiveness, we consider, in part, whether that requirement substantially changes the legal relationship between the parties. Mid-East Contractors, Inc., B-242435, Mar. 29, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 342. With respect to certification requirements, our review has focused primarily on the effect of the certification on the

1/ FAR § 3.104-10 implements 41 U.S.C.A. § 423(e)(1) (West Supp. 1990), a statute which provides that no agency shall award a contract to any bidder unless it certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 423, pertaining to the procurement.

focused primarily on the effect of the certification on the obligation of the bidder if it received the award. Tennier Indus., Inc., B-239025, July 11, 1990, 69 Comp. Gen. 586, 90-2 CPD ¶ 25. A certification requirement is necessary in order to make a bid responsive only if the certification provision imposes requirements materially different from those to which the bidder is otherwise bound, either by its offer or by law. Id.


With respect to the Certificate of Procurement Integrity, we have recently dealt at length with the issue of its effect on responsiveness in Mid-East Contractors, Inc., B-242435, supra. There, in considering the materiality of the certification, we noted, for example, that the requirement obligates a named officer or employee of the bidder to become familiar with the prohibitions of the OFPP Act, and imposes on that individual and the bidder a requirement to make full disclosure of any possible violations of the Act, and to certify to the veracity of that disclosure. Further, the signer is required to collect similar certifications from all other individuals involved in the preparation of bids. We also found significant the fact that the certification provides remedies not otherwise available to the government. Based on these factors, we concluded that the certification imposes material obligations on the bidder, that its execution therefore is a material term of the IFB, and that failure to complete the certification therefore renders a bid nonresponsive. In so concluding, we specifically rejected the idea that the failure to complete the certificate could be treated as a matter of responsibility that could be corrected after bid opening; in as much as the OFPP Act relies on the certification to identify and obligate one individual to be familiar with its provisions and carry out other duties, failure to complete it leaves unresolved who will be the focus of the Act's obligations. Our conclusion in Mid-East was consistent with our previous case law, see Fry Communications, Inc., B-237666, Feb. 23, 1990, 90-1 CPD ¶ 215 and Atlas Roofing Co., Inc., B-237692, Feb. 23, 1990, 90-1 CPD ¶ 216, and it is applicable here. Hence, GSA properly rejected Emjay's bid as nonresponsive.

Emjay complains of inconsistency among different agency procurements as to placement of the certificate in the solicitation and the proper time required for its submission, resulting, Emjay claims, in its confusion about the matter. For example, Emjay claims that in a recent (February 1991) procurement by the Army, where Emjay received the award, the contracting officer permitted Emjay to submit its Certificate of Procurement Integrity after bid opening and before award. Furthermore, Emjay argues, the placement of the certification in Volume I of the solicitation, entitled "Specifications," instead of Volume II, entitled "Bid Forms," was confusing and

misleading, causing it to believe that by completing all of Volume II it had met all requirements.

We reject Emjay's arguments. One agency's actions on a prior procurement are irrelevant to the legal propriety of another agency's actions in connection with a subsequent procurement; each procurement stands on its own in this respect. See Cobra Technologies, Inc., B-238031 et al., Feb. 27, 1990, 90-1 CPD ¶ 242. Further, whether or not the protester found the arrangement of the IFB confusing, it was furnished the IFB in its entirety, and was responsible for submitting a bid meeting all of its requirements, however arranged in the solicitation. We note that the other two bidders submitted the certificate with their bids, with no apparent confusion about the requirement.

The protest is dismissed.



John M. Melody
Assistant General Counsel